Supreme Court of the United States

OCTOBER TERM, 1944

No. 799

SAFEWAY STORES, INCORPORATED, *Petitioner,*

v.

CHESTER BOWLES, Price Administrator.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS AND BRIEF IN SUPPORT THEREOF

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December 29, 1944.

PRESS OF JUDD & DETWEILER, INC., WASHINGTON, D. C.

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Petition for a Writ of Certiorari to the United States Emergency Court of Appeals and Brief in Support Thereof

PETITION

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petition of Safeway Stores, Incorporated, respectfully submits to this Honorable Court the following:

A

STATEMENT OF MATTER INVOLVED

This case is based upon a protest filed by petitioner against a maximum price regulation issued by the Price Administrator whereby the petitioner and other chain store

organizations, and also certain large independent stores, were ultimately subjected to a 4% rollback from the retail ceiling price established for each grade of beef, veal, lamb and mutton cuts if the meat department of the individual store had a total gross margin of 19% or less on its sales during the year 1941. The regulation was issued in purported pursuance of Section 2 of the Emergency Price Control Act, 56 Stat. 23, 50 U. S. C. Appx. § 901.

Petitioner is a Maryland corporation with its principal office in Oakland, California. It owns and operates more than 2,300 retail food stores in 23 states of the United States and in the District of Columbia as a single corporate entity. All of these stores sell numerous commodities, including meats, at retail. The majority of the stores had a total sales volume for the year 1942 of less than $250,000 per store, but the combined total of all stores for that year was more than $40,000,000. The petitioner has an historic publicly-advertised and consumer-accepted policy of maintaining the same prices on the same commodities in all of its stores in the same trading area, irrespective of the total sales volume of each store.

Maximum Price Regulation 355, as amended by the Price Administrator on March 14, 1943 (Amendment No. 3,[1] 8

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[1] In the statement of the considerations involved in the issuance of Amendment No. 3 to MPR 355 the following paragraph appears (Record, p. 64):

> "Further surveys made by the Administrator reveal that prevailing prices established by the General Maximum Price Regulation for these large-volume stores are lower than the level of prices fixed for Class 3 and 4 stores. Consideration is being given to the setting up of a fifth class of retail stores. The past operations of these retail outlets were on a low-margin basis, and the reduction required will not restrict those margins. The volume of business done by the stores affected comprises a substantial part of the total volume of retail-food business. Hence, the omission to take account of them separately would materially affect the cost of living."

F. R. 6428), required petitioner's retail stores that had a total 1942 individual sales volume of $250,000 or more to sell at retail each grade of beef, veal, lamb, and mutton cuts at a ceiling price 10% lower than the maximum established for other stores similarly classified (placed in so-called Group 3 and 4) but which were not a part of a chain store group which had a combined 1942 sales volume of $40,000,000 or more. In other words, the rollback was imposed only upon the very large chain store organizations, including petitioner.

Prior to the issuance of MPR 355 there were four store classifications based on 1942 sales volume: Group 1 included independent stores with a sales volume of less than $50,000; Group 2 included independent stores with a sales volume of $50,000 or more but less than $250,000; Group 3 included chain stores (those comprising a group of four or more under common ownership whose combined 1942 sales totaled $500,000 or more) having a volume of less than $250,000; and Group 4 included all chain and independent stores with a sales volume of $250,000 or more. (R. 33-4.)

By combining the groups, Section 2(c) of MPR 355 reduced the existing classifications to two in number: "Group 1 and 2" included independent stores which had a 1942 total sales volume of less than $250,000 and "Group 3 and 4" included all other stores. Then came Amendment 3 which, for the purpose of imposing the 10% rollback, added a new classification, one consisting of stores which had a total individual sales volume in 1942 of $250,000 or more, as did the minority of petitioner's stores, and which were members of a chain store organization which had a combined total 1942 sales volume of $40,000,000 or more, as did petitioner.

Therefore, although the 10% rollback were applicable only to a minority of its stores, because a majority had individual 1942 sales of less than $250,000, the petitioner, in order to continue its historic one-price policy in a trading area, was obliged to apply the rollback to all of its stores in that area.

On August 13, 1943, in the Office of Price Administration, there was held a meeting of representative members of the retail meat dealers, both chain and independent, in connection with MPR 355. The meeting *unanimously* approved a resolution presented by the Director of the National Retail Meat Dealers Association recommending that the classification of stores based upon volume of sales and/or type of ownership be abandoned, and that but a single ceiling price be established for each grade of regulated meat at the retail level so that the consuming public might be protected in times of scarcity while permitting the forces of competition to act for the public benefit in times of plentiful supply.[2] (R. 36, 76, 81.)

On September 2, 1943, the Administrator issued Amendment No. 10 to MPR 355 whereby he changed to 4% the 10% reduction previously provided and, instead of restricting the rollback to chain stores having a total sales volume of $40,000,000 or more, he extended its application to all Group 3 and 4 stores (including independent stores with a total sales volume of $250,000 or more) but limited it to those which in 1941 had a total gross margin of 19% or less on meat department sales.[3] Thus, while the rollback classi-

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[2] A similar recommendation was made by representatives of the wholesale and retail food industry in June, 1943. See footnote 5, p. 14, post.

[3] Amendment No. 10, 8 F. R. 12237, provides, in part:

". . . If any group 3 and 4 store had during 1941 a total gross margin of 19% or less on its meat department sales of all items including beef, veal, lamb, mutton, pork, poultry, sausage, variety meats and edible by-products, then the ceiling prices

fication was enlarged, in that it embraced all chain stores regardless of individual or combined sales volume and also all independents with sales of $250,000 or more, its application was restricted to those stores with a 19% or less meat sales margin. Therefore, even though only a small number, or just one, of petitioner's stores in a given trading area had such a meat department sales margin, the petitioner, if it is to follow its historic one-price policy, must treat all of its stores in that area as having a 19% or less meat sales margin and reduce their prices 4% below the established ceilings.

On January 11, 1944, the petitioner, pursuant to a show-cause order issued by the Administrator, filed a "Further Statement" (R. 29-38) in support of its protest, wherein it insisted that the relief sought had not been granted by the issuance of Amendment No. 10 and requested (R. 38) the abolishment of the discriminatory classification of stores and the establishment of a single ceiling price on each of the regulated grades of meat.

On May 24, 1944, the Administrator denied the protest (R. 39), and on June 23, 1944, a complaint (R. 70-78) was

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applicable to such store for each grade of beef, veal, lamb and mutton cuts shall be 4% lower, adjusted to the nearest cent, than the ceiling prices established herein for group 3 and 4 stores in the appropriate zone. . . ."

In the statement of considerations involved in the issuance of the amendment the following appears (R. 66):

"The Administrator has consulted with representative members of the industry, has reviewed the original data and has obtained some new data on margins. From these sources he finds that the original reduction was too great on the stores subject to Amendment 3 while it omitted to include many stores which were not a part of the large organizations but operated on as low margins. . . . Because the records of retail stores are not ordinarily kept on the basis of gross margins on individual meats, it has been deemed advisable to provide for the new classification to which the 4 per cent differential applies on the basis of realized gross margins on the meat department as a whole. . . ."

filed in the United States Emergency Court of Appeals pursuant to Section 204(a) of the Emergency Price Control Act, 50 U. S. C. Appx. §924(a), 56 Stat. 31. That court entered a judgment of dismissal on November 29, 1944. (R. 88.)

B

JURISDICTION

The jurisdiction of this Court is invoked under Section 204(d) of the Emergency Price Control Act, 50 U. S. C. Appx. §924(d), 56 Stat. 31. The complaint herein was dismissed by the Emergency Court on November 29, 1944. (R. 88.)

C

QUESTIONS PRESENTED

The primary questions presented are—

(1) Whether the Administrator acted arbitrarily or capriciously in not establishing a single-price ceiling for meats at the retail level.

(2) Whether the Administrator may, arbitrarily and without substantial basis, impose a 4% rollback from the established meat ceiling prices for Groups 3 and 4 stores which had a 1941 meat department sales margin of 19% or less, or whether such action is unconstitutionally discriminatory.

(3) Whether the interpretation placed by the Emergency Court upon the review provisions of the Act render them ineffective and offend against the due process clause of the Fifth Amendment.

D

REASONS FOR THE ALLOWANCE OF THE WRIT

1. *The Emergency Court of Appeals has decided a substantial question of federal law of general importance which has not been, but should be, settled by this Court.* Section 2 (a) of the Emergency Price Control Act provides for the establishment of maximum prices which will be "generally fair and equitable". The decision of the Emergency Court herein is to the effect that a rollback from established ceiling prices may be discriminatively applied and at the same time be "fair and equitable". The Court refuses to recognize any discrimination in the application of the rollback but considers its only duty to be to determine whether the over-all price structure has been shown not to be generally fair and equitable. Discrimination is condoned if it does not result in an actual operating loss to the person who is adversely affected.[4] Such an interpretation of the Act circumvents the intent thereof to prevent inflation without resort to arbitrary tactics, such tactics being grounds for declaring a regulation invalid under the review provisions of the Act. If such an interpretation were warranted, the Act would be invalid as unconstitutionally discriminatory.

2. *The Emergency Court has interpreted the Price Control Act in such a way as to defeat the due process of law guaranteed by the Fifth Amendment to the Constitution*

[4] The question of whether the Price Control Act authorizes injuriously discriminatory and arbitrary action by the Administrator in the purported furtherance of a "generally fair and equitable" over-all price structure is also discussed in another petition (Docket No. 798) filed by Safeway Stores, Incorporated, in this Court today. The Emergency Court, in its decision herein, refers (R. 85, 87) to its decision in the other case.

and provided by Congress. Section 204 of the Act contains provisions for the review of actions of the Administrator denying protests against price regulations. The Emergency Court is empowered to set aside any regulation which is found to be "arbitrary or capricious". However, by interpreting the Act to *authorize* arbitrary methods unless they are shown to be unfair and inequitable to a *major* portion of an industry, the court has rendered ineffective the review provisions and made a mockery of the due process provided by the Act and guaranteed by the Fifth Amendment.

3. *The Emergency Court has not given proper effect to an applicable decision of this Court.* It has accepted the Administrator's discriminatory and arbitrary findings at face value in accordance with its own narrow interpretation of the requirements of the Price Control Act and of due process, without regard for the lack of any "substantial basis" for those findings as stated by this Court to be a necessary part of the Administrator's statement of the considerations involved in the issuance of any regulation.

Wherefore, the petitioner prays that a writ of certiorari be issued to review the judgment of the United States Emergency Court of Appeals in the above entitled cause, that said judgment be reversed, and that petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and proper.

Respectfully submitted,

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December 29, 1944.

Supreme Court of the United States

OCTOBER TERM, 1944

No.799

SAFEWAY STORES, INCORPORATED, *Petitioner,*

v.

CHESTER BOWLES, Price Administrator.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

OPINION BELOW

The opinion (R. 84) of the United States Emergency Court of Appeals was rendered on November 29, 1944, and is not yet reported.

II

JURISDICTION

The judgment of the Emergency Court was entered on November 29, 1944. (R. 88.) The jurisdiction of this Court is invoked under Section 204(d) of the Emergency Price Control Act of 1942, 56 Stat. 31, 50 U. S. C. Appx. §924(d).

III

STATEMENT OF THE CASE

A full statement of the case has been given under heading "A" of the Petition (pp. 1-6 herein) and it is incorporated here by reference.

IV

SPECIFICATION OF ERRORS

1. The Emergency Court erred in entering a judgment dismissing the complaint.

2. The Emergency Court erred in holding that the Administrator was warranted in refusing to accept the industry recommendation for a single-price ceiling.

3. The Emergency Court erred in holding that the Administrator was justified in imposing a 4% rollback on Groups 3 and 4 stores which had a 1941 meat department sales margin of 19% or less.

4. The Emergency Court erred in failing to find that the rollback imposed by the Administrator was without any substantial basis and was unconstitutionally discriminatory.

V

QUESTIONS PRESENTED

The primary questions presented are—

(1) Whether the Administrator acted arbitrarily or capriciously in not establishing a single-price ceiling for meats at the retail level.

(2) Whether the Administrator may, arbitrarily and without substantial basis, impose a 4% rollback from the established meat ceiling prices for Groups 3 and 4 stores which had a 1941 meat department sales margin of 19%

or less or whether such action is unconstitutionally discriminatory.

(3) Whether the interpretation placed by the Emergency Court upon the review provisions of the Act render them ineffective and offend against the due process clause of the Fifth Amendment.

VI

STATUTORY PROVISIONS INVOLVED

The only statute involved is the Emergency Price Control Act of 1942, 56 Stat. 23, as amended, 50 U. S. C. Appx. §901 et seq. The provisions thereof, insofar as pertinent to the questions here presented, follow:

> "Sec. 2. (a) . . . the Price Administrator . . . may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941, . . . Before issuing any regulation or order under the foregoing provisions of this subsection, the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be affected by such regulation or order, and shall give consideration to their recommendations. . . ."
>
> "Sec. 204. (a) . . . Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: . . .
>
> "(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. . . ."

VII

SUMMARY OF ARGUMENT

Point 1. The Administrator, contrary to the intention of Congress, failed and refused to give due consideration to the practical recommendation of representative members of the retail meat industry that there be a single ceiling price established at the retail level.

Point 2. The Administrator adhered to academic and statistical studies, unrelated to price control, for guidance, and evolved a new classification of stores (within Groups 3 and 4) based upon a 1941 sales margin of 19% realized in the meat department of each store, and then imposed a 4% rollback upon all of those stores which were on the unfavored side of the 19% line of demarcation. This was done without substantial basis and was therefore arbitrary, capricious and contrary to the ruling of this Court.

Point 3. The imposition, without any substantial basis, of a price rollback upon chain stores and large ($250,000 gross sales) independents which realized, in 1941, a 19% or less meat sales margin while permitting all other stores to charge the established ceiling prices, is not only arbitrary and capricious within the meaning of the Act but it is also unconstitutionally discriminatory in violation of the due process clause of the Fifth Amendment. However, instead of setting aside the regulation, the Emergency Court disregarded the arbitrary nature thereof on the ground that the over-all price structure was not shown to be generally unfair and inequitable. In order to make such a showing it would be necessary, according to the lower court, to show that the regulation is unfair and inequitable in its application to a *major* portion of the industry. The obvious impracticability of presenting such a showing makes the court's interpretation a bar to any effec-

tive review, and it therefore makes a mockery of the due process provided by the Act and guaranteed by the Fifth Amendment.

VIII

ARGUMENT

Point 1. The Administrator Arbitrarily and Capriciously Ignored the Recommendation of Representative Members of the Industry that there be but One Price Ceiling for Meat at the Retail Level.

The Emergency Price Control Act, as it was originally passed in 1942, provided (Section 2(a)) that "Before issuing any regulation or order . . . the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be affected by such regulation or order." Obviously, Congress would not have inserted that provision if it had not intended that the Administrator should pay some attention to the recommendations of industry when he found it "practicable" to "advise and consult" with representatives thereof. However, apparently because of the Administrator's failure to heed industry recommendations even when they were before him, Congress, by the amendatory Act approved June 30, 1944, 58 Stat. 632, clarified the foregoing provision by adding thereto this specific admonition: "and shall give consideration to their recommendations."

Significantly, in the statement of the considerations involved in the issuance of Amendment No. 3 imposing a 10% rollback only on large stores belonging to very large chain organizations no mention was made of any consultation with representative members of the industry. But on August 13, 1943, Amendment No. 3 was issued, and after petitioner's protest was filed, a meeting of representative members of the industry was held at the Office of Price Administration. That meeting unanimously approved a

resolution declaring that the classification of stores based upon the volume of sales and/or type of ownership should be abandoned, and that a single ceiling price should be established for each grade of meat at the retail level so that the consuming public might be protected in time of scarcity while permitting the forces of competition to operate in time of plentiful supply.[5] (R. 36.) This was and still is pure business sense, based upon practical experience.

Although the Administrator specifically admits (Answer, R. 81) that the foregoing recommendation for a single ceiling price was made he at no point states that consideration was given thereto. However, he does casually observe (R. 46) that "a single maximum price for all retail stores would have been unfair to the industry." And he then seeks to explain: "Thus a single price for some stores offering many services and for large self-service stores would be either so high that larger stores would enjoy unprecedented margins, with a consequent increase in prices to the consumer, or so low that it would make continued operation by the small service store impossible." Such a statement, accepted at face value by the lower court (R. 86), disregards not only the considered, practical recommendation of industry representatives, but also the established fact that the forces of competition invariably control within a maximum limit. Of course, scarce items might be sold at the maximum price by some stores which otherwise would sell at a lower price, but when the items are scarce the chances are that the store which is compelled to sell at the lower price will not have its proportionate

[5] Two months previously, at a meeting of representatives of the wholesale and retail food industry, including both chains and independents, large and small, held in Washington upon the invitation of the Price Administrator, detailed recommendations were adopted including one for the establishment of a single ceiling price. (See Record, pp. 291-3 in Docket No. 798, being another petition filed in this Court today by Safeway Stores, Incorporated.)

supply of the scarce items. This is shown by the present record: petitioner received only 70% of the meat supply permitted by Government quota allowances. (R. 6, 17-18.)

There are very practical reasons why, in times of scarcity, the low-cost retail distributor does not receive a fair proportion of available supplies. For example, in the case of beef, the regulations (MPR 169) establish ceiling prices which vary according to type and method of distribution. Packers and slaughterers, when selling fabricated cuts, are in a position to secure a higher price for beef than when they sell in carcass form. Quantity discounts also have a tendency to discourage the flow of beef to direct-buying (low-cost) retailers because they customarily purchase beef in carcass form in *carload* lots. The regulations provide a differential between carload and less-than-carload purchases, and this provision, during times of scarcity, diverts available supplies of beef to distributors of small quantities because of the additional compensation obtainable from them. It is only natural that packers and slaughterers should be inclined to make the maximum possible sales first through channels affording the greater return.

Furthermore, even in the case of scarce items, if a store which normally sells at reduced prices should take advantage of the period of scarcity and increase the prices of the scarce items it would have an immediate ill effect upon the good will of customers and would tend to divert them to the stores which normally sell at maximum prices. Therefore, the few normally low-cost stores which might take advantage of a period of scarcity to charge the maximum prices could not reasonably be said to constitute an inflationary threat.

Although the Administrator, after his conference (R. 26, 49, 66) with representative members of the industry, and after considering (R. 40) petitioner's protest, became con-

vinced that the 10% rollback imposed upon the large stores in the very large chain organizations was ill advised, he apparently was unwilling to relinquish his hold upon his academic theory of some sort of store classification. Therefore, while reducing the rollback to 4% he retained the theory of a price differential based upon a store classification, but he made the amount of the 1941 meat department sales margin the determining factor. Of course, he wholly ignored the specific recommendation of representative members of the industry that there be a single ceiling price at the retail level. Such disregard may only be characterized as arbitrary and capricious.

Point 2. The Administrator Arbitrarily and without any Substantial Basis Imposed a 4% Rollback on Groups 3 and 4 Stores which had a 1941 Meat Department Sales Margin of 19% or Less.

When the Administrator modified MPR 355 by issuing Amendment No. 10 he did not grant the relief requested by petitioner but only decreased the amount of the rollback imposed. True, he also changed the classification of stores, but petitioner is still penalized because it is a chain organization and because some of its stores realized a 1941 meat margin of not more than 19%. (In order to continue its established single-price policy it must also apply the rollback to substantially all of its stores which had a 1941 meat sales margin of more than 19%.) It is not made applicable to independent stores which had a 1942 sales volume of less than $250,000 (Group 1 and 2 stores), regardless of the 1941 margin realized on meat department sales. It is also inapplicable to all stores, regardless of sales, whose gross 1941 margin on meat exceeded 19%.

Therefore, the regulation in its amended form does not affect hundreds of petitioner's competitors (Group 1 and 2 stores) who are in a comparable sales volume category

(according to 1942 figures) with the majority of petitioner's stores. Nor does it give effect to the aforementioned recommendation of representative members of the industry that the Administrator abandon any classification of stores based upon sales volume and/or type of ownership.

Apart from the Administrator's apparent insistence that some sort of store classification must be imposed in spite of recommendations of industry to the contrary, he seems to be subject to sporadic theories as to the method of classifying. Initially, according to his own statement (R. 58), he had five classes in mind; then he decided to combine the first two, thus leaving the four groups above mentioned at the time of the issuance of MPR 355. This regulation not only combined Group 1 with Group 2, and Group 3 with Group 4, but it made a new class composed of chain stores with a 1942 sales volume of $250,000 or more belonging to an organization which did a 1942 gross business of $40,000,000 or more. Then came Amendment 10 with a modification of the new classification based upon the 1941 margin on meat department sales and including all chain stores having a 19% margin or less and all independents with such margin that had a 1942 sales volume of $250,000 or more.

The determination to classify stores in the first place for the purpose of regulating prices seems to have been motivated by various studies, academic and otherwise, none of which was for the purpose of controlling prices or any other business practice. They were made by "governmental agencies and private institutions such as schools of busines administration and business research firms." (R. 46-7.) They were for purely academic or statistical purposes or for the use of such persons as marketing analysts, credit managers, and investment bankers.

The academic basis for the Administrator's store classification theories may be illustrated by the importance which he attaches to the *definition* of a "supermarket", and his statement that "Other definitions indicate the fundamental importance of large annual sales volume as marking a distinct category of selling unit." (R. 47.)

Until the issuance of MPR 355 the Administrator made sales volume, rather than the service rendered the customer, the only factor in determining the classification into which both independent and chain stores were placed. If the independent had a 1942 sales volume of less than $250,000 it was placed in Group 1 or Group 2 depending upon which side of the $50,000 sales volume line it fell; otherwise it was placed in Group 4. If the chain store had a 1942 volume of less than $250,000 it was automatically placed in Group 3, otherwise in Group 4. By Amendment 10 to MPR 355, the Administrator for the first time created a classification based upon a sales margin. Whereas *sales volume of all commodities* was the determining factor for the classification of all stores, and so continued for most purposes, by Amendment 10 the Administrator used a new and special method, namely, the 1941 *sales margin* on *meat only*, to classify stores for the purpose of the rollback on meat.

The arbitrary and theoretical nature of the sales margin method in conjunction with the existing over-all sales volume classification is shown in cases where, for example—

> (a) One of petitioner's stores had a 1942 sales volume of $240,000 and a 1941 meat department sales margin of 19% and competes with a nearby independent or chain store which had a 1942 sales volume of $200,000 and a 1941 meat department sales margin of 23%. Petitioner's store would be required to reduce its meat prices 4% below the maximum otherwise permitted whereas its competitor would be allowed to

sell at the maximum. This would be true even though petitioner's annual sales volume had in the meantime decreased to $220,000 and its competitors had increased to $260,000. In other words, the competitor would be permitted maximum prices regardless of a substantially increased sales volume over 1942, while petitioner, whose volume may have substantially decreased during the same period, would be forced to apply the 4% rollback.

(b) One of petitioner's stores had a 1942 sales volume of $150,000 and a 1941 meat department sales margin of 18% (due to competitive conditions and the desire to increase volume in that particular store), while a nearby chain or independent store had a 1942 sales volume of $500,000 and a 1941 meat department sales margin of 21%. The competitor is not required to apply the 4% rollback, but it is made applicable to petitioner. Due to wartime conditions and the shortage of meats it is impossible for petitioner to continue to operate profitably on an 18% basis but it is nonetheless required to roll back the maximum prices 4%, whereas the competitor may continue on the old basis.

(c) One of petitioner's stores was, prior to the regulation in question, on substantially an even competitive basis with a nearby store, each of them having had a 1942 sales volume of more than $250,000 and virtually the same sales margin, namely, a 19% margin in the case of petitioner's 1941 meat department sales, and 19½% in the case of the competitor. The competitor, whether he be an independent or a member of a chain, may continue to charge maximum prices, but petitioner, because its 1941 margin was ½% lower, is forced to charge 4% less than the maximum permitted its competitor.

The foregoing illustrative cases, while hypothetical, are indicative of many similar conditions in the industry and are only logical in the course of changing conditions.

Even though petitioner had submitted scores of actual instances, similar to those above set forth, the Administrator would probably have contended that they were not general throughout petitioner's organization (unless the great majority of petitioner's more than 2,300 stores were proved to be so situated) and, even though they were, he would have sought the protection of the catch-all defense that the conditions shown were not indicative of conditions throughout the industry and that petitioner had, therefore, failed to prove that the regulation "is not generally fair and equitable for retail sellers of meat generally". Indeed, that is substantially the position taken by the lower court, which thus imposes upon petitioner a burden which admittedly could never be carried—a burden which was not envisioned by the Congress and which is repugnant to all rules of reason.

This Court, in *Yakus v. United States*, 321 U. S. 414, 423, 88 L. ed. 653, 659, referred to the objective of, and the standards prescribed by, the Price Control Act and stated:

> ". . . It is enough to satisfy the statutory requirements that the Administrator finds that the prices fixed will tend to achieve that objective and will conform to those standards, and that *the courts in an appropriate proceeding can see that substantial basis for those findings is not wanting.*" (Emphasis supplied.)

Thus, this Court holds that there must be a "substantial basis" for the Administrator's findings, rather than a mere "summary statement of the basic facts" which the Emergency Court has interpreted the Act as requiring. See *Montgomery Ward & Company v. Bowles*, 138 F. (2d) 669, 671.

The "statement of considerations", which Section 2(a) of the Act requires the Administrator to make, were held

by this Court, in the *Yakus* case, to play an important part in making possible a proper appraisal of the Administrator's actions.[6] It is, therefore, important to note the statements which he issued in connection with the regulations here involved.

In the statement of the considerations involved in the issuance of Amendment No. 3 to MPR 355 imposing a 10% rollback upon retail meat prices established for the stores belonging to the large chain organizations merely refer to "further surveys made by the Administrator" as a basis for his finding that the 10% rollback was proper. (R. 64.)

In the statement of considerations involved in the issuance of Amendment No. 10 to MPR 355 whereby the 10% rollback was reduced to 4% and imposed on all chain stores and also the large (Group 4) independents, the Administrator merely stated that he had "reviewed the original data" and "obtained some new data on margins", from which sources he found that the original reduction of 10% was too great and did not cover independent stores which operated on as low margins as the large chains, but that 4%, applied to all Group 3 and 4 stores, would permit margins "approximately the same as they observed in the past". (R. 66.)

It is submitted that neither of these statements affords that "substantial basis" which this Court has held to be necessary to support the Administrator's findings, and that his imposition of the 4% rollback upon those chain and large independent stores on the wrong side of the 19% line of demarcation was and is arbitrary and capricious.

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[6] This Court stated (321 U. S. 426, 88 L. ed. 661):

> "The *standards* prescribed by the present Act, *with the aid of the 'statement of considerations'* required to be made by the Administrator, *are sufficiently definite and precise* to enable Congress, the courts and the public to ascertain whether the Administrator, in fixing the designated prices, has conformed to those standards. . . ." (Emphases supplied.)

Point 3. The Interpretation of the Emergency Court makes the Price Control Act Unconstitutionally Discriminatory and Renders the Review Provisions Ineffective in Violation of the Due Process Clause of the Fifth Amendment.

We have seen how the Administrator has discriminated against petitioner by imposing upon it a 4% rollback from the established ceiling prices without according the same treatment to the great majority of petitioner's competitors; also why, during a period of scarcity, the low-cost retail distributor like petitioner does not even receive its proportionate share of available supplies, thus enhancing the discrimination practiced by the Administrator. If the Price Control Act should be held to authorize any such injuriously discriminatory and arbitrary action by the Administrator it would violate the due process clause of the Fifth Amendment. *Currin v. Wallace*, 306 U. S. 1, 14, 83 L. ed. 441, 450; *Detroit Bank v. United States*, 317 U. S. 329, 337, 87 L. ed. 304, 311. An interpretation of the Act to that effect is, of course, equally offensive.

The question of due process under the Price Control Act was presented in *Yakus v. United States*, supra. This Court examined the provisions of the statute and came to the conclusion that "the authorized procedure is *not incapable* of according the protection to petitioners' rights required by due process."[7] A part of the "authorized

[7] This Court stated (321 U. S. 434, 88 L. ed. 665):

> "For the purposes of this case, in passing upon the sufficiency of the procedure upon protest to the Administrator and complaint to the Emergency Court, it is irrelevant to suggest that the Administrator or the Court has in the past or may in the future deny due process. *Action taken by them is reviewable in this Court and if contrary to due process will be corrected here.* . . . But upon a full examination of the provisions of the statute it is evident that the authorized procedure *is not incapable* of according the protection to petitioners' rights required by due process." (Emphases supplied.)

procedure" is contained in Section 204 providing for the review by the Emergency Court of actions of the Administrator denying protests against price regulations. Under subsection (b) a regulation shall be set aside if it be "not in accordance with law, or is arbitrary or capricious." Therefore, if the Administrator act arbitrarily, as he did in this case, the court must set aside the regulation, or the part thereof, in question.

Here the court found there was no showing that the overall price structure was not "generally fair and equitable" and so *disregarded the arbitrary features thereof.* This is in accordance with its opinion expressed in *Philadelphia Coke Company v. Bowles,* 139 F. (2d) 349, 355, that a regulation is valid unless it is unfair and inequitable in its application to a "*major* portion of the industry." In other words, it is insufficient if petitioner disclose arbitrary features of a regulation even though they be injuriously discriminatory to a substantial segment (but not a major numerical part) of the industry. The obvious impracticability of having the majority of the members of any industry join in presenting such a showing makes the court's interpretation a bar to any effective review, and it therefore makes a mockery of the due process provided by the Act and guaranteed by the Fifth Amendment.

IX

CONCLUSION

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Honorable Court of its supervisory powers in order that both the substantive and procedural provisions of the Emergency Price Control Act, as amended, may be given the effect intended by Congress and required by the Constitution; and that to such

end a writ of certiorari should be granted, and that this Court should review the judgment of the United States Emergency Court of Appeals and finally reverse it.

Respectfully submitted,

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December 29, 1944.

No. 799

In the Supreme Court of the United States

OCTOBER TERM, 1944

SAFEWAY STORES, INCORPORATED, PETITIONER

v.

CHESTER BOWLES, PRICE ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the United States Emergency Court of Appeals (R. 84–87) is reported in 145 F. (2d) 846.

JURISDICTION

The judgment of the United States Emergency Court of Appeals was entered November 29, 1944 (R. 88). The petition for a writ of certiorari was filed December 29, 1943. Jurisdiction of this Court is invoked under Section 204 (d) of the Emergency Price Control Act of 1942, as amended, c. 26, 56 Stat. 23 (herein sometimes referred to as "the Act"), making applicable

Section 240 of the Judicial Code, as amended (28 U. S. C. 347).

QUESTIONS PRESENTED

1. Whether Maximum Price Regulation 355 issued by the Price Administrator establishing maximum prices for sales of meat at retail is arbitrary and capricious or otherwise contrary to law because it does not establish a single maximum price for sales of each grade and cut of meat by all retail sellers, as recommended by certain representatives of the industry.

2. Whether Maximum Price Regulation 355 issued by the Price Administrator establishing maximum prices for sales of meat is arbitrary, capricious or otherwise contrary to law because for the purpose of such prices it classifies retail stores in part on the basis of volume and in part on the basis of gross margins realized on meat in 1941.

3. Whether the Emergency Court of Appeals determined, contrary to Section 204 (a) of the Act, that it is not authorized to set aside a maximum price regulation which has been established to be arbitrary or capricious unless it is also shown to be unfair and inequitable to a major portion of the industry affected.

STATUTE AND REGULATION INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, as amended, and of

Maximum Price Regulation No. 355—Retail Ceiling Prices for Beef, Veal, Lamb and Mutton Cuts, and all Variety Meats and Edible By-Products—are set forth in the Appendix, *infra*.

STATEMENT

On and after May 18, 1942, the maximum prices for the sale at retail of beef, veal, lamb and mutton cuts were fixed by the General Maximum Price Regulation (7 F. R. 3153) at the highest price at which such cuts were sold by the same seller in the month of March 1942. On April 5, 1943, the Administrator issued Maximum Price Regulation No. 355, Retail Ceiling Prices for Beef, Veal, Lamb and Mutton Cuts,[1] which was designed to substitute dollars-and-cents retail prices, uniform within defined zones, for the ceilings established on fresh meats at retail by the General Maximum Price Regulation. Regulation No. 355 established two sets of prices for each zone. The higher set of prices applied to so-called "Group 1 and 2" stores, defined to include all retail food stores, other than chain stores, whose gross sales of all commodities in the year 1942 were less than $250,000. The lower set of prices applied to "Group 3 and 4" stores, which included all other stores; that is, any chain store—defined as one of four or more stores under common ownership whose combined sales in 1942 were $500,000 or

[1] 8 F. R. 4423. See R. 53–63 (Statement of Considerations).

more—and any independent store with gross annual sales of $250,000 or more in 1942.[2]

Originally Maximum Price Regulation No. 355 was to become effective April 15, 1943. Amendment No. 1[3] to Maximum Price Regulation No. 355 postponed the effective date of the regulation until May 17, 1943, in order to permit reexamination of the prices in the light of Executive Order No. 9328, issued April 8, 1943, which directed the Price Administrator "to authorize no further increases in ceiling prices except to the minimum extent required by law." Amendment No. 2,[4] issued May 12, 1943, reduced the prices originally announced for beef cuts. Amendment No. 3,[5] issued May 14, 1943, in effect created a new (or third) class of stores, consisting of those which had a total sales volume in 1942 of $250,000 or more, and which were members of a chain store organization having a combined total sales volume in 1942 of $40,000,000 or more. Prices for those stores were fixed 10% below the prices for other Group 3 and 4 stores. After further consideration and consultation with the trade, the Administrator, by Amendment No. 10,[6] issued September

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[2] By Amendment No. 16 to the regulation, issued May 24, 1944, the year 1943 was substituted for 1942, 9 F. R. 5504, 5505.

[3] 8 F. R. 4922.

[4] 8 F. R. 6214.

[5] 8 F. R. 6428. See R. 64 (Statement of Considerations).

[6] 8 F. R. 12237. See R. 65–66 (Statement of Considerations).

2, 1943, changed the third classification to include any individual chain or independent Group 3 or 4 store which in 1941 had a total gross margin of 19% or less on its meat department sales. Prices for the third class, as thus redefined, were fixed 4% below the Group 3 and 4 prices.

Petitioner is the owner and operator of some 2,300 retail food stores located in many states. Since the combined sales volume of all its stores was more than $40,000,000 in 1942, it was required, by Amendment No. 3, to take the 10% lower price for meat in those of its stores which had a 1942 sales volume of $250,000 or more. (R. 1–2.) The protest followed. Amendment No. 10 raised the lower price from 10% below the Group 3 and 4 level to 4% below. And it made the price applicable to stores on the basis of their 1941 gross meat margin, rather than their volume of sales. In response to the Administrator's order providing an opportunity to show why the relief requested had not been granted (R. 26), petitioner submitted a statement which was directed primarily at the reiteration of objections to any price classification at all (R. 29–38). The protest was then denied with an opinion (R. 40–52), and petitioner filed its complaint with the Emergency Court of Appeals (R. 70–78). The court sustained the denial of the protest and dismissed the complaint. (R. 84–88.)

ARGUMENT

The petition does not present any generally significant question warranting consideration by this Court, and the decision of the court below was clearly right.

I. Underlying petitioner's diverse assertions of errors by the Administrator and by the court below is the single objection that it is arbitrary and capricious to classify retail stores so as to establish different maximum prices for sales at retail of the same cut and grade of meat in the same geographical zone. The reasons for having any classification at all of retail stores for the purpose of establishing maximum retail meat prices were set forth in the Administrator's opinion denying the protest. (R. 46–47.) Some classification was deemed necessary for the reason that, prior to price control, there was a wide range in the margins of different types of retail stores. Petitioner at no time disputed that this condition prevailed generally in the industry. It is, indeed, a matter of common knowledge.[7] The failure to recognize this fact would clearly have been inconsistent with fair and workable price control. A single maximum price would have been either too low to permit the continued opera-

[7] In fact, petitioner's protest stated that the Great Atlantic and Pacific Tea Co. and Colonial Stores, Inc. ordinarily have three ranges of prices in their retail food stores (R. 10, 13). Cf. *Great Atlantic and Pacific Tea Co.* v. *Ervin*, 23 F. Supp. 70, 77 (D. Minn. 1938).

tion of the small service stores or so high that the larger stores offering less service would have had unprecedented margins and consumers would have had unnecessary price increases. With respect to petitioner's insistence that competition would have held prices down, it is enough to say that the Administrator cannot be deemed to have been unreasonable, considering the inflationary forces at large (cf. *Philadelphia Coke Co.* v. *Bowles,* 139 F. (2d) 349 (Em. App. 1943)), in refusing to rely upon competitive forces to keep prices at proper levels.

Petitioner's attack upon the lawfulness of any classification of retail stores is based in part on the contention that the Administrator refused to follow the recommendation of members of the industry. While changes in Amendment No. 3 to Maximum Price Regulation No. 355 were under consideration, the Office of Price Administration conducted a meeting attended by certain representatives of the industry. They recommended that a single maximum price should be established at retail for each cut and grade of meat. Petitioner argues that the issuance of Amendment No. 10 in the face of this recommendation was arbitrary and capricious because it violated the provision in Section 2 (a) of the Act which requires that "Before issuing any regulation or order * * * the Administrator shall, so far as practicable, advise and consult with representa-

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tive members of the industry which will be affected by such regulation or order."

Petitioner reads a requirement of consultation as imposing an absolute duty to follow the recommendations of those consulted. This is obviously untenable. It is true, of course, that an obligation to consult implies an obligation to consider the recommendations of those consulted.[8] But there is no doubt that the Administrator considered the recommendation that price differentials be abolished. The opinion denying the protest sets forth the reasons why the Administrator deemed it improper to disregard, in the establishment of maximum prices, the variations in selling price among classes of stores which existed before price control (R. 46).[9] That consideration marks the limit of the Administrator's statutory obligation. Moreover, it can hardly be deemed arbitrary to reject recommendations which would place upon normal competitive forces a large part

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[8] This obligation has been made explicit by the Stabilization Extension Act of 1944, which adds to the provision quoted above the clause: "and shall give consideration to their recommendations."

[9] It may be noted that the food industry was not unanimously opposed to the principle of classifying retail prices. At the hearings before the House Committee on Banking and Currency, in connection with the extension of the Emergency Price Control Act, counsel for the Food Industry War Committee opposed recommendations for a one-price policy in retail stores for substantially the same reasons which led the Administrator to reject them. Hearings on H. R. 4376, 78th Cong., 2d Sess., Vol. 1, p. 408.

of the burden of keeping in control the wartime prices of important cost-of-living commodities.

2. Petitioner's more specific objection to Maximum Price Regulation 355 is directed against the 4% differential in price established for Group 3 and 4 stores which in 1941 had a meat department sales margin of 19% or less. The evolution and basis of this particular classification and differential are set forth in full in the Administrator's opinion accompanying the denial of the protest and are well summarized in the opinion of the court below (R. 47–51, 86–7). As those opinions indicate, the Administrator initially set up for meat prices the same classifications, based on chain affiliation and aggregate store sales volume, which had been used in earlier food regulations, with one difference: only two sets of prices were fixed, one for Group 1 and Group 2 stores, the other for Group 3 and Group 4 stores. Comparison of the proposed prices with those prevailing under the General Maximum Price Regulation—which reflected actual selling prices in March 1942—revealed that extreme price increases would result among the Group 3 and 4 stores. To preserve the pre-existing pattern, and to avoid unwarranted price increases, a third class was required. The distinction between Group 3 and Group 4 stores on the basis of sales volume alone, which had generally provided a satisfactory boundary, did not reflect, however, the pre-existing price differences in meat and so would not have furnished a suitable classification.

It appeared, in general, that the lower meat prices had prevailed in the larger chains. Accordingly, Amendment No. 3, which was issued before the regulation became effective,[10] established for the large volume stores of the large chains prices 10% below those established for other Group 3 and 4 stores. After the regulation became effective, the Administrator found that the basis for defining the third class of stores had two undesirable consequences. It resulted in an undue burden on some individual outlets, and it left at the higher prices some independent supermarkets, and some stores in small chains, which had customarily had margins and prices as low as those of low margin stores in the larger chain organization.

An effort was made to formulate a classification which would preserve about the same price level, but which would avoid these undesirable effects. Further study indicated that there had been in the past about a two-cent price difference between the higher priced stores and the lower priced stores within Group 3 and 4. Because of

[10] Amendment No. 3 was issued May 14, 1943 and the Regulation became effective May 17. Under these circumstances, it is not clear what justification there is for petitioner's repeated reference to the action as a price "rollback." There is nothing in the record to show that petitioner fared differently than the other chain stores for which the prices established when Maximum Price Regulation No. 355 became effective represented an increase over the prices theretofore prevailing under the General Maximum Price Regulation (R. 48).

changes in buying opportunities, and other conditions brought about by the war, the Administrator concluded that under the regulation the price difference should not exceed one cent. Since volume of sales alone did not, in this particular case, define the low-priced from the high-priced sellers, the Administrator concluded that a fairer basis for distinction would be the actual, historical operating margins of the sellers. A 19% margin was picked as the dividing line because study of the historical margin data available indicated that a 19% margin reflected a price level one cent, or 4%, below the general Group 3 and 4 level. In other words, a store which in March 1942 had a price one cent below the prices which existed in the small chain stores at that time would have had an all-meat margin of 19%. The Administrator therefore provided, by Amendment 10, that the maximum prices for any store, chain or independent, which had annual sales of more than $250,000 in 1942 and a total gross margin of 19 percent or less in its meat department in 1941 should be 4% below the dollars and cents prices previously specified for Group 3 and 4 stores.[11]

Petitioner argues that the Administrator acted arbitrarily because the classification is based in part on sales volume and in part on historical

[11] By Amendment No. 12, 8 F. R. 14738, these prices were set up in the regulation in dollars and cents form, referred to as Group 3B and 4B.

margins. But petitioner at no point in the proceeding attacked the Administrator's finding that the modification in the basis for classification was designed to and did achieve differentials in maximum prices more closely approximating the price differentials which prevailed among different classes of stores before price control. Such an adjustment would appear to be the antithesis of arbitrary action, as the court below observed. Moreover, in the absence of any showing that the classification adopted failed to reflect with reasonable precision the pre-existing competitive price relationships, it is difficult to determine the ground for petitioner's charge that the classification established by Amendment No. 10 was without substantial basis.

Petitioner apparently contends (Pet. 20–21) that the Administrator's action must be deemed arbitrary unless the record contains all the statistical data underlying the determination that a classification based upon a 19% margin and a differential of 4% would fairly reflect the historical price differentials prevailing before price control, even in the absence of a challenge specifically directed to the correctness of that determination. In advancing this suggestion petitioner confuses a statement of the Emergency Court of Appeals in *Montgomery Ward & Co.* v. *Bowles,* 138 F. (2d) 669, 672, applicable solely to statements of considerations accompanying the issu-

ance of maximum price regulations, with language of this Court in *Yakus* v. *United States*, 321 U. S. 414, relevant to the evidence which the record must contain in order to support findings of the Administrator which have been appropriately challenged. Neither the provisions of the statute nor the opinion of this Court in the *Yakus* case require that the Administrator must include in his statements of considerations or his opinions accompanying the denial of protests all of the economic material or statistical data having any bearing upon the price action involved, irrespective of the nature of the challenge to that action. Such a requirement would indeed render administration impossible.

Petitioner also relies on three admittedly hypothetical cases to establish the arbitrary character of the classification. The short answer is that difficult border line cases are inescapable when the problem requires the drawing of precise lines where there existed before a continuously varying range of differences. Cf. *Carmichael* v. *Southern Coal and Coke Co.*, 301 U. S. 495, 510.

3. Finally, petitioner asserts that in deciding the present case the Emergency Court of Appeals so interpreted the Act as to render it unconstitutionally discriminatory and make the review provisions ineffectual in violation of the due process clause of the Fifth Amendment. This argument is based primarily on the assumption

that the Administrator's action was in fact arbitrary, an assumption which is without substance for the reasons already indicated. The argument further assumes that the Emergency Court of Appeals has construed the Act as requiring that a regulation or order be set aside only if it is unfair and inequitable to a major portion of the industry affected. Prior decisions of the court below, as well as the decision in the present case, show that this charge is unfounded.

Section 2 (a) of the Act requires that regulations issued by the Price Administrator shall be generally fair and equitable. The Emergency Court of Appeals has construed this requirement, consistently with its plain meaning and the clear evidence of congressional intention as found in the legislative history,[12] as meaning that a maximum price regulation "must be fair and equitable in its application to the group of sellers considered as a whole"; that it does not meet this standard "if its application to a major portion

[12] For example, the report of the Senate Committee on the bill which became the Emergency Price Control Act said, with respect to Section 2 (a):

"Because of the legislative nature of regulations establishing maximum prices, applying to large numbers of sellers, the bill does not guarantee a profit to each individual seller. It requires instead that such prices be generally fair and equitable as applied to the sellers responsible for the major part of the output of the commodity. As to such sellers it is the effect of the maximum price upon their over-all operations as business units that must be considered." (Sen. Rep. 931, 77th Cong., 2d Sess., p. 15.)

of the industry is unfair or inequitable." *Philadelphia Coke Co.* v. *Bowles*, 139 F. (2d) 349, 355. The court was there concerned with the broad problem necessarily posed by the basic standard of Section 2 (a) of the Act. Similar holdings of the court are to be found in *Madison Park Corp.* v. *Bowles*, 140 F. (2d) 316, and *Gillespie-Rogers-Pyatt Co.* v. *Bowles*, 144 F. (2d) 361. In the case last cited, the court recognized that an individual protestant might establish a *prima facie* case of general unfairness without producing evidence as to the condition of the entire industry. See also *Cudahy Bros. Co.* v. *Bowles*, 142 F. (2d) 468.

But there is nothing in any of these cases to support petitioner's assertion that the Emergency Court of Appeals has made this standard the exclusive test of the validity of the Adminstrator's action. In addition to recognizing that regulations must be generally fair and equitable, the court has repeatedly emphasized its authority to set aside regulations found to be arbitrary or capricious in their treatment of particular situations, notwithstanding their general fairness. See *Cudahy Bros. Co.* v. *Bowles*, *supra*; *Buckley, Dement & Co.* v. *Bowles*, 143 F. (2d) 877; *Flett* v. *Bowles*, 142 F. (2d) 559; *Consolidated Water Power & Paper Co.* v. *Bowles* (E. C. A.), decided December 6, 1944; *Adams, Rowe & Norman* v. *Bowles*, 144 F. (2d) 357. In the last three cases

cited, the Emergency Court of Appeals set aside the regulation involved on the ground that the complainants had established "to the satisfaction of the court that the regulation * * * [was] arbitrary or capricious."

Furthermore, in the present case the court expressly held, after reviewing the basis for the Administrator's action in adopting the classification in question, that his action "was quite the opposite of arbitrary or capricious." (R. 87.) The court's statement of its reasons for arriving at that conclusion is, we submit, unassailable.

CONCLUSION

The decision below is correct and does not warrant further review. The petition should therefore be denied.

CHARLES FAHY,
Solicitor General.

RICHARD H. FIELD,
General Counsel,
Office of Price Administration.

FEBRUARY 1945.

APPENDIX

I. Pertinent Provisions of the Emergency Price Control Act of 1942, as amended:

SEC. 2. (a) Whenever in the judgment of the Price Administrator (provided for in section 201) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative), for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the following: Speculative fluctuations, general increases or decreases in costs

of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941: *Provided*, That no such regulation or order shall contain any provision requiring the determination of costs otherwise than in accordance with established accounting methods. Every regulation or order issued under the foregoing provisions of this subsection shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order. As used in the foregoing provisions of this subsection, the term "regulation or order" means a regulation or order of general applicability and effect. Before issuing any regulation or order under the foregoing provisions of this subsection, the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be affected by such regulation or order, and shall give consideration to their recommendations. In the case of any commodity for which a maximum price has been established, the Administrator shall, at the request of any substantial portion of the industry subject to such maximum price, regulation, or order of the Administrator, appoint an industry advisory committee, or committees, either national or regional or both, consisting of such number of representatives of the industry as may be necessary in order to constitute a committee truly representative of the industry, or of the industry in such region, as the case may be. The committee shall select a chairman from among its members, and shall meet at the call of the chairman. The Administrator

shall from time to time, at the request of the committee, advise and consult with the committee with respect to the regulation or order, and with respect to the form thereof, and classifications, differentiations, and adjustments therein. The committee may make such recommendations to the Administrator as it deems advisable, and such recommendations shall be considered by the Administrator. Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, without regard to the foregoing provisions of this subsection, issue temporary regulations or orders establishing as a maximum price or maximum prices the price or prices prevailing with respect to any commodity or commodities within five days prior to the date of issuance of such temporary regulations or orders; but any such temporary regulation or order shall be effective for not more than sixty days, and may be replaced by a regulation or order issued under the foregoing provisions of this subsection.

* * * * *

(c) Any regulation or order under this section may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act * * *.

SEC. 204. (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals,

created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided,* That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to

be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court.

(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. The effectiveness of a judgment of the court enjoining or setting aside, in whole or in part, any such regulation, order, or price schedule shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (d) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the case by the Supreme Court.

II. (a) Maximum Price Regulation No. 355, sections 1 and 2, as originally issued (8 F. R. 4424):

SECTION 1. This regulation fixes dollar-and-cents ceiling prices on all retail sales of beef, veal, lamb, and mutton cuts made on and after April 15, 1943. The only retail beef, veal, lamb and mutton cuts which may be sold are those described

in section 20 of this regulation. The United States is divided into 12 zones. Different ceiling prices are fixed for sales made in each zone for sales of different grades and for sales made by different classes of retail stores. Your ceiling prices depend on the zone where your store is, its class, and the grade of the meat you are selling. A store includes any place where beef, veal, lamb and mutton cuts are sold at retail.

SECTION 2. (a) You will find your ceiling prices for each grade of beef, veal, lamb and mutton cuts on your "OPA List of Ceiling Prices for Beef, Veal, Lamb and Mutton—Fresh, Frozen, Cured" (Article III, section 22). A copy of the list for each kind of meat for your zone and class may be obtained from your local War Price and Rationing Board or from your local OPA Office.

(b) You can find out from your local War Price and Rationing Board or your OPA office what zone your store is in. After each list of prices in section 22, Article III, there is a description of the zone in which that list of prices applies.

(c) Your store is in "Class 1 and 2" if it had a 1942 total sales volume of less than $250,000 and if it is not a "chain store". Otherwise, it is in "Class 3 and 4".

(d) Your store is a "chain store" if it is one of a group of four or more stores owned by one person which had a combined total sales volume for all stores of $500,000 or more during 1942. If you are in doubt whether your store is in "Class 1 and 2" consult the directions given in section 13, 14 and 15.

(b) Maximum Price Regulation No. 355, Section 2 (a), as amended by Amendment No. 3 (8 F. R. 6428):

SECTION 2. (a) If any store had a 1942 total sales volume of $250,000 or more, and is one of a "chain store" group which had a combined total sales volume for all stores of $40,000,000 or more during 1942, the ceiling prices for each grade of beef, veal, lamb and mutton cuts applicable to such store shall be 10 percent lower, adjusted to the nearest cent, than the ceiling prices established herein for Class 3 and 4 stores.

(c) Maximum Price Regulation No. 355, Section 2 (a), as amended by Amendment No. 10 (8 F. R. 12237):

SECTION 2. (a) You will find your ceiling prices for each grade of beef, veal, lamb, and mutton cuts on your "OPA List of Ceiling Prices for Beef, Veal, Lamb and Mutton—Fresh, Frozen or Cured" (Article III, § 22) and for variety meats and edible by-products on your "OPA List of Ceiling Prices for Variety Meats and Edible By-Products" (Article III, § 28). A copy of the list for each kind of meat, variety meat and edible by-product for your zone and group may be obtained from your local War Price and Rationing Board or from your district OPA office. If any group 3 and 4 store had during 1941 a total gross margin of 19% or less on its meat department sales of all items including beef, veal, lamb, mutton, pork, poultry, sausage, variety meats and edible by-products, then the ceiling prices applicable to such store for each grade of beef, veal, lamb and mutton cuts shall be 4%

lower, adjusted to the nearest cent, than the ceiling prices established herein for group 3 and 4 stores in the appropriate zone. If the store was not in operation in 1941, then its total gross margin for the department on sales during 1942 shall be used and if it is 19% or less, the above lower prices shall be applicable.

This amendment No. 10 shall become effective September 20, 1943.

(d) Maximum Price Regulation No. 355, Section 2, as amended by Amendment No. 12 (8 F. R. 14738):

SECTION 2. You will find your ceiling prices for each grade of beef, veal, lamb and mutton cuts on your "OPA List of Ceiling Prices for Beef, Veal, Lamb and Mutton—Fresh, Frozen or Cured" (Article III, § 22), and for variety meats and edible by-products on your "OPA List of Ceiling Prices for Variety Meats and Edible By-Products" (Article III, § 28), and for miscellaneous beef items on your "OPA List of Ceiling Prices for Miscellaneous Beef Items" (Article III, § 29). A copy of the list for each kind of meat, variety meat, and edible by-product, and for miscellaneous beef items for your zone and group may be obtained from your district office of the Office of Price Administration.

(b) You can determine from your local War Price and Rationing Board on your OPA office what zone your store is in. After each list of prices in section 22, Article III, there is a description of the zone in which that list of prices applies. The zones are the same for variety meats and edible by-products except that Zone 4a, which

is described at the end of section 28, Article III, is taken out of Zone 4 and made into a separate zone.

(c) Your store is in "Group 1 and 2" if its total "annual gross sales" are less than $250,000 and if it is not a "chain store". Otherwise it is in "Group 3 and 4". To determine your "annual gross sales" consult sections 13, 14 or 15. However, if any "Group 3 and 4" store had during 1941, a total gross margin of 19 percent or less on its meat department sales of all items including beef, veal, lamb, mutton, pork, poultry, sausage, variety meats and edible by-products, it is in "Group 3B and 4B". If the store was not in operation in 1941, then its total gross margin for the meat department on sales during 1942 shall be used, and if it is 19 percent or less it shall be in "Group 3B and 4B".

(d) Your store is a "chain store" if it is one of four or more stores owned by one person which had combined "annual gross sales" for all stores of $500,000 or more. To determine your "annual gross sales," consult section 13, 14 or 15.

(e) The appropriate regional office of the Office of Price Administration and such other offices as may be authorized by the appropriate regional office may, upon a finding by the Regional Administrator that any price or prices established by this regulation for zone, 2, 3, 5 or 6 will increase the level of prices prevailing in a specific area within the region, issue an order designating such area, suspending the effectiveness of any price or prices herein established, and fixing a lower ceiling price or lower ceiling prices.

(e) Maximum Price Regulation No. 355, Section 2 (f), as added by Amendment No. 16 (9 F. R. 5505):

SECTION 2. (f) Effective May 25, 1944, this regulation requires that the year 1943 be used as the basis for figuring your "annual gross sales" instead of the year 1942. If you find that as a result of that change, your store is now in a group different from the one it was in before, you must, on and after June 15, 1944, use the ceiling prices fixed for the group in which you are now classified.

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